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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 813

THE OHIO POWER COMPANY, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Ohio Power Company, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The opinion of the Court of Claims (Appendix, *infra*) is reported at 157 F. Supp. 158.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Did the Court of Claims misinterpret the prior Opinion and Order of this Court by denying petitioner's motion for a new trial and for leave to plead an alternative issue on the sole ground that when the case was previously here on certiorari this Court had assumed original jurisdiction and had disposed of such issue which admittedly had neither been pleaded nor decided in the court below?

No statutes or regulations are stated, since the above question involves only the fact as to whether the lower court correctly interpreted this Court's prior Opinion and Order, and whether the interpretation below can be correct in view of numerous decisions of this Court relating to the status of issues which had not been pleaded or decided by the lower court, and which were not raised on petition for certiorari.

STATEMENT

On March 1, 1955, the Court of Claims decided the instant case in favor of the petitioner, 131 C. Cls. 95, and on March 30, 1955, entered the money judgment. The only issue presented to and decided by that court was whether Section 124 of the Internal Revenue Code of 1939 empowered the certifying authority to include in certificates covering facilities necessary in their entirety to national defense a restriction limiting the tax amortization deduction to a percentage of the total cost of such facilities. The Court decided the statute did not empower the certifying officers to impose such limitation and entered judgment for petitioner. Respondent's petition for certiorari was de-

nied (350 U. S. 862). Thereafter, respondent's petition for rehearing and motion for leave to file a second petition for rehearing were denied by this Court (350 U. S. 919, 351 U. S. 958).

Subsequently, writs of certiorari were granted in *Allen-Bradley Company* v. *United States,* 134 C. Cls. 800 and *Commissioner* v. *National Lead Co.,* 230 F. 2d 161 (C.A. 2), (351 U. S. 981), which cases presented solely the same statutory issue as that decided in petitioner's case below. In those cases this Court held that the applicable statute empowered the certifying agency to limit amortizable cost of certified facilities to excess war cost. *Allen-Bradley Company* v. *United States,* 352 U. S. 306; *National Lead Co.* v. *Commissioner,* 352 U. S. 313. Thereafter, this Court in a four to three decision granted the Government's petition for rehearing in the present case, vacated its order denying certiorari, granted certiorari, and reversed the judgment below on the authority of its decisions in *Allen-Bradley* and *National Lead.* (353 U. S. 98.) The order entered stated in part:

> "The cause is reversed; and the same is hereby remanded to the United States Court of Claims."

On July 12, 1957, the Court of Claims vacated its former judgment and dismissed the petition. On August 9, 1957, petitioner filed a timely motion requesting the court to vacate that order, and to grant petitioner a new trial and leave to file an amended petition to raise an alternative ground for recovery.

The alternative ground, as set forth in petitioner's motion below, is that, although conceding that the applicable statute empowered the certifying officers to limit amortizable cost of certified facilities to excess

war cost, the War Production Board in issuing an "excess war cost" certificate to this petitioner for its Tidd Project Emergency Facility, had violated the provisions of Executive Order 9406 (8 Fed. Reg. 16955, Dec. 17, 1943) and the applicable administrative rules and regulations. It was alleged that, because the construction of the Tidd Project had commenced prior to October 5. 1943, the Executive Order required petitioner's certificate to be issued pursuant to the rules and regulations of the Secretaries of War and Navy as they had existed and were interpreted prior to October 5, 1943, and that those rules and regulations made no provision for "excess war cost" certificates of necessity based upon presumed post-war utility, in contradistinction to the War Production Board's later rules and regulations which were applicable to the certificates for post-October 5, 1943, construction involved in *Allen-Bradley* and *National Lead.* It was further alleged below, in support of the motion for leave to amend, that prior to October 5, 1943, the regulations and administrative rules in effect, as interpreted and applied by the Secretaries of War and Navy, prohibited the issuance of such restricted certificate, but that such prohibition was erroneously ignored by the War Production Board in the issuance of petitioner's certificate.

Such alternative issue had not been presented to or decided by the Court of Claims on the original trial, and the relevant facts with respect thereto were, therefore, not included in the record certified to this Court when review of the lower court's decision was sought by the Government. The Government's petition for certiorari did not present this alternative ground for review by this Court. This Court's Opinion and Order of reversal and remand made no reference to any such

alternative, but were based squarely "upon the application of the principles announced" in *Allen-Bradley* and *National Lead*. The sole issue determined by this Court in those latter two cases was whether the statute itself (Section 124) empowered the certifying officers to issue partial certificates limiting amortization to "excess war cost" after the regulations had been amended on October 5, 1943, to permit them to do so prospectively. The violation of the Executive Order and of the administrative rules and regulations with respect to petitioner's certificate, now relied upon by this petitioner, was not raised in either of the other two cases, and could not have been raised because the facts there would not have supported it.[1]

Petitioner did refer in this Court to the alternative ground as distinguishing its case from those of *Allen-Bradley* and *National Lead*, but only in resisting the third of the Government's repeated attempts to obtain a writ of certiorari in the instant case.[2]

The Court of Claims, in its opinion of December 4, 1957, pointed to such limited use of the alternative ground by petitioner when it denied petitioner's motion for a new trial and for leave to file an amended petition, and held that it was precluded from considering the alternative issue solely on the ground that such issue had been adjudicated by this Court in reversing the prior decision below.

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[1] See petitions for certiorari in *United States* v. *Allen-Bradley*, Oct. Term 1955, No. 923, and in *National Lead Co.* v. *Commissioner*, Oct. Term 1955, No. 988.

[2] *United States* v. *Ohio Power Co.*, October Term 1955, No. 312, Respondent's Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing, May, 1956.

REASONS FOR GRANTING THE WRIT

Certiorari is requested on the ground that the lower court erroneously interpreted this Court's prior opinion and order in this case. It is petitioner's position that such alternative ground was not—and could not have been—decided by this Court, and that petitioner has never been heard on this issue. If that position is correct, the lower court's opinion is in conflict with the prior opinion and order of this Court. "Certiorari is often granted and the matter clarified . . . where the court of appeals has allegedly misconstrued or misapplied an applicable Supreme Court opinion." [Stern and Gressman, "Supreme Court Practice," 2nd Ed., p. 114.]

The instant case was originally submitted to the Court of Claims by the petitioner on a motion for summary judgment grounded on the single issue of whether Section 124 of the Internal Revenue Code of 1939 empowered the certifying authorities to issue certificates of necessity limited to the excess war cost of the entirely necessary emergency facilities. This statutory issue had previously been decided by that court favorably to the taxpayer in *The Wickes Corp.* v. *United States,* 123 C. Cls. 741, in which case certiorari was not sought by the Government. This made it unnecessary for the petitioner in its original pleadings to allege and prove the facts in support of the alternative issue now presented by its proffered amended petition in the court below.

The question now presented is whether this Court in reversing the prior decision of the Court of Claims, which was based on the statutory issue, considered and decided the alternative issue of whether petitioner's restricted certificate of necessity was issued, contrary

to Executive Order 9406, in violation of the applicable regulations and administrative rules in effect prior to October 5, 1943, as construed and applied by the Secretaries of War and Navy.[3]

That question was not raised by the original pleadings below; the lower court had no occasion to consider it; the Government did not present it in petitioning for certiorari in this Court; and the *per curiam* opinion and order, reversing and remanding the case, give not the slightest indication that this Court decided it on review. Indeed, this case was reversed and remanded solely on the authority of the principles decided in the *Allen-Bradley* and *National Lead* cases. In neither of those cases was the alternative issue involved or decided either below or by this Court. Only the question of statutory power was presented and decided there. Thus, in reversing and remanding the instant case on the authority of those decisions, this Court could not have been ruling upon that alternative question, unique in petitioner's case.

The Court of Claims in its decision of December 4, 1957, freely admits that the petitioner's alternative issue was not considered or adjudicated there but holds that it was nonetheless determined by this Court in reversing the judgment below. The Court of Claims

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[3] A similar violation of the applicable regulations was condemned by this Court in *Service* v. *Dulles*, 354 U. S. 363, where, as here, the statute conferred broad authority upon the administrative officer who, by regulations, limited the powers so conferred. This Court held that the exercise of the statutory authority must conform to the limitations in the regulations, absent which the action of the administrative officer was wholly ineffective. The attention of the Court is respectfully invited to the fact that the *Service* case was decided approximately two months after this Court reversed the decision of the Court of Claims in the petitioner's case.

said (*supra*, pp. 159-160, reprinted in Appendix, *infra*):

> ". . . The plaintiff says that neither this court nor the Supreme Court has considered and adjudicated the merits of its asserted alternative ground for recovery.
>
> "So far as this court is concerned, the plaintiff's statement is correct. As to the Supreme Court, the Government says that the alternative ground was presented to that Court . . .
>
> * * * * * * * *
>
> "Because of the Government's persistence in its attack upon the plaintiff's judgment, the plaintiff had the opportunity, of which it took advantage, of attempting to distinguish *Allen-Bradley* and *National Lead*, from its own case, after those cases had been decided by the Supreme Court. As the plaintiff's case then stood in the Supreme Court, if the Court had been impressed by the plaintiff's attempted distinction, it could have denied the Government's pending petition for a rehearing, and let its former denial of *certiorari* stand. Or it could have granted *certiorari* and affirmed the judgment with an opinion approving the plaintiff's attempted distinction of its other decisions. In fact it granted *certiorari* and reversed our judgment with an order putting the plaintiff's case on all fours with *Allen-Bradley* and *National Lead*.
>
> "The plaintiff, in effect, asks us to conclude that the Supreme Court did not consider and decide the question of whether the plaintiff's case was distinguishable from *Allen-Bradley* and *National Lead*. The plaintiff's only evidence in support of such a conclusion is that the Supreme Court did not express an opinion upon the question. In court, as elsewhere, silence may be an opinion."

The errors in the foregoing decision are readily apparent. First, the fact that this Court put petitioner's case on all fours with *Allen-Bradley* and *National Lead,* in reversing the judgment below, does not show that this Court decided the alternative issue, i.e., that the pre-October 5, 1943 rules and regulations were violated; it shows just the opposite—that such issue was never considered—because those two cases were decided solely upon the issue of statutory power, and did not involve the rules and regulations applicable to facilities the construction of which had commenced prior to October 5, 1943.

Second, and even more significant, the lower court is wrong in concluding that on the prior review this Court "could have granted *certiorari* and affirmed the judgment with an opinion approving" petitioner's "attempted distinction." Such conclusion could not be correct because the necessary and appropriate facts with respect to the alternative issue were not included in the record certified to this Court. In order to establish the alternative issue, now raised by the motion below for leave to file an amended petition, it is necessary for petitioner to establish that its construction commenced prior to October 5, 1943, and that the Secretaries of War and Navy had adopted administrative interpretations and rules with respect to their pre-October 5, 1943 regulations which prohibited the issuance of the particular kind of percentage certificate received by this petitioner, namely, an "excess war cost" percentage certificate based upon presumed post-war utility. Those are fact questions not in the record; the evidence which will support them is similar to evidence of the rules adopted by the War Production Board interpreting the new regulation of October

5, 1943—evidence which the Government has previously introduced by affidavit of a certifying officer into the records in *National Lead* and in *Wickes, supra,* to show that the post-October 5, 1943, regulations authorized "excess war cost" certificates where the certified facility could be presumed to have post-war usefulness.

References in petitioner's brief in this Court, to the pre-October 5, 1943, regulations of the Secretaries of War and Navy and the amendment thereto of October 5, 1943, were made—and could have been made—only in an attempt to oppose the granting of the writ of certiorari and not for the purpose of presenting to this Court the facts with respect to the alternative issue, facts which were not even a part of the record.

In the third place, the Court of Claims is in error because this Court does not ordinarily pass upon questions not presented by the petition for certiorari, and certainly does not decide such questions by silence.[4] Not only was this alternative issue, based as it is on additional facts, not pleaded or decided on the original proceeding in the court below, but it was not presented as a question for determination by this Court in the Government's petition for certiorari filed in 1955, and finally granted in 1957. The only question presented in that petition was the scope of the "statutory authority" granted to the certifying officers by Section 124 of the Internal Revenue Code.[5] No issue was presented with respect to the additional administrative restric-

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[4] Rule 23, 1(c), of Revised Rules of the United States Supreme Court provides as follows:

> "Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

[5] *United States* v. *Ohio Power Co.*, Oct. Term 1955, No. 312, Petition for Certiorari, filed August, 1955.

tions imposed by Executive Order 9406, conferring the certifying power on the War Production Board, or with respect to the administrative rules, interpretations, policies and practices of the Secretaries of War and Navy under their regulations in effect prior to October 5, 1943, governing the issuance of certificates of necessity.

The conclusion of the Court of Claims that the alternative issue was decided *sub silentio,* even though not pleaded and passed upon below and not raised by a petition for certiorari, is in conflict with the normal and usual review procedures thoroughly established by the decisions of this Court. *Duignan* v. *United States,* 274 U. S. 195; *Blair* v. *Oesterlein Mach. Co.,* 275 U. S. 220; *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481; *Hormel* v. *Helvering,* 312 U. S. 552; *Walters* v. *St. Louis,* 347 U. S. 231; *De Sylva* v. *Ballentine,* 351 U. S. 570; *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192, at p. 200, footnote 8; *Commissioner* v. *LoBue,* 351 U. S. 243 (1956).

Walters v. *St. Louis, supra,* involved an appeal by taxpayers from a judgment of the Supreme Court of Missouri. In rejecting consideration of an additional ground which was not before the court below, this Court said (p. 233):

> "... *Of course, we will not undertake to review what the court below did not decide.* The state court has not passed on any question of discrimination arising from the regulations or any question as to the interpretation or validity thereof. We have here only the very limited issue—does the statute or the ordinance on its face violate the Fourteenth Amendment? (Italics added.)

Similarly, in *Helvering* v. *Tex-Penn Oil Co., supra,* which was before this Court on writ of certiorari to a Federal circuit court of appeals, it was stated (p. 498):

> ". . . The parties presented their respective claims to the board and to the lower court on the theory that, if neither Tex-Penn nor its stockholders as such received any cash from Transcontinental, the transaction would be within § 202 (b). The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. Helvering v. Minnesota Tea Co., 296 U. S. 378, 380, 80 L. ed. 284, 285, 56 S. Ct. 269. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies. His failure earlier to present the question leaves this court without the assistance of decision below. His petitions for these writs did not present the question to this court. We are not called on to consider the construction of § 202 (b) now proposed."

Even in the few cases where this Court has considered an issue not raised in the court below or where an intervening decision by another court has arisen which might be deemed applicable to the decision under consideration, it has been the practice of this Court to remand the case to the lower court for consideration of the new issue or for reconsideration in the light of the intervening decision.

This is well illustrated by *Hormel* v. *Helvering, supra,* wherein this Court, speaking through Mr. Justice Black, said (at pp. 556-560):

> "Ordinarily an appellate court does not give consideration to issues not raised below. . . . This is essential in order that parties may have the oppor-

tunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. . . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. . . .

* * * * *

"In accordance with this principle, we are of opinion that the court below should have given and properly did give consideration to § 22 (a) in determining petitioner's tax liability. . . .

"But the Board of Tax Appeals neither found the facts nor considered the applicability of § 22 (a) in the light of the Clifford Case. . . . Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue, however remote may be his chance to take his case out of the Clifford rule. Accordingly, the judgment of the lower court reversing the decision of the Board of Tax Appeals is affirmed, with directions to the Board of Tax Appeals for further proceedings in accordance with this opinion."

That philosophy appears to be singularly applicable here, where the petitioner is seeking to present for decision in the Court of Claims the facts with respect to an issue which was not presented to or decided by that court on the original submission because the *Wickes* decision, *supra*, on the question of statutory power was then the controlling authority.

The foregoing rule is further exemplified by the action of this Court in *Helen I. Watson* v. *United States,* 2 L. Ed. 2d 23. There the plaintiff below had been denied the privilege of amending the pleadings to assert an alternative issue because the Court of Claims concluded that the new issue was without merit. However, after this Court decided *Service* v. *Dulles,* 354 U. S. 363, the plaintiff in the *Watson* case applied for a writ of certiorari, which application was not opposed by the Government. This Court granted certiorari and remanded the case to the Court of Claims for further consideration in the light of the *Service* decision. It is worthy of note that this Court did not decide the alternative issue in the *Watson* case but left such decision for the court below.

The Court of Claims, in concluding its decision of December 4, 1957, overruling the plaintiff's motion for a new trial and for leave to file an amended petition, observes that, while this Court did not express an opinion upon the question, "silence may be an opinion." This strikingly unusual conclusion of the Court of Claims appears to conflict with this Court's decision in *Ex Parte Union Steamboat Co.,* 178 U. S. 317, 319, wherein this Court said, in part:

> ". . . The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court . . . (*Re Sanford Fork & Tool Co.*, 160 U. S. 247, 256, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291); and the opinion of this court may be consulted to ascertain exactly what was decided and settled." (Citing cases.)

Certainly under the rule expressed in the above quotation "silence" by this Court with respect to an issue not pleaded or disposed of by the court below,

affords no basis for a later conclusion that the issue was considered and settled by this Court. On the contrary, it is implicit in the expressed rule that any issue in a case not resolved by the decision of this Court upon review may be considered and decided after remand and that, in considering whether such issue had been disposed of, the court below should be guided by this Court's opinion and order.

The situation is somewhat analogous to the case of *Cahill* v. *New York, N. H. & H. R. Co.*, 351 U. S. 183 (1956), where this Court corrected its own mandate to show that it had not *sub silentio* decided an issue which had not been considered and passed upon below by the Court of Appeals. In the *Cahill* case this Court originally reversed the Court of Appeals and remanded the case to the District Court for the entry of judgment for the plaintiff. But on motion to recall its judgment, this Court recalled the judgment from the trial court and amended it to remand the cause to the Court of Appeals for further proceedings because that court had not passed upon one of the issues necessary to support a judgment for the plaintiff. In the case at bar the alternative issue was not even raised in any of the prior proceedings. *A fortiori*, the lower court here should be instructed that the issue was not decided by this Court, and should be directed to reconsider petitioner's motion for a new trial and for leave to amend its petition to raise such issue.

Especially where the undecided issue involves *questions of fact* as well as of law, the rule that the issue must be left to the lower court has special force (see *Hormel* v. *Helvering*, *supra*). The Government, in resisting petitioner's motion for a new trial and for leave to amend its pleadings, contended in the court

below that Section 5 of the War Department Regulations on issuance of necessity certificates (7 Fed. Reg. 4233) demonstrates, as a matter of law, that the pre-October 5, 1943, regulations of the Secretaries of War and Navy authorized the issuance of certificates limiting amortizable cost to "excess war cost" where it could be presumed that the facility had post-war utility. This contention is both erroneous and contrary to the Government's own argument made to this Court in *Allen-Bradley* and *National Lead* that the amendment of October 5, 1943, was the origin of the War Production Board's later "excess war cost" rule.[6]

Section 5 provides as follows:

> "5. *Effect of Necessity Certificate.*
>
> a. *General rule.* A Necessity Certificate is conclusive evidence of certification by certifying authority that the facilities therein described are necessary in the interest of national defense up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after June 10, 1940."[7]

An examination of the foregoing regulation discloses that it is not by any stretch of inference a substantive provision affirmatively authorizing the issuance of the particular type of percentage certificate involved in this case in which the amortization deduction on certified facilities was limited to their "excess war cost" where the post-war utility of such facilities could be presumed. It is Section 3 of the Regulations of the

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[6] See footnote 8, *infra*.

[7] The date was later changed to December 31, 1939, to accord with an amendment to the law.

Secretaries of War and Navy which sets forth the substantive considerations which will determine the "percentage" referred to in Section 5; and whether an "excess-war-cost" percentage certificate was authorized under Section 3 prior to October 5, 1943, depends upon proof as to the administrative interpretation and practices of the Secretaries of War and Navy under that section before its amendment.

Section 5 does not state, as the Government's argument has implied, that the Secretaries of War and Navy were authorized to issue "excess-war-cost" certificates. That section 5 contained no such authority is shown by the fact that this same regulatory provision was later carried over into the regulations of the War Production Board governing the issuance of necessity certificates (8 Fed. Reg. 16964). But the Board never relied upon its Section 5 as substantive authority for issuing "excess war cost" percentage certificates. Rather, it is the amendment of October 5, 1943, to Section 3 of the regulations which has always been pointed to as the substantive authority for the "excess war cost" rule.[8]

Petitioner has never denied that Section 3 of the regulations of the Secretaries of War and Navy, prior to October 5, 1943, permitted the issuance of some types of percentage of cost certificates, as where the

[8] At page 21 of its brief in *Allen-Bradley*, the Government quotes, in part, section 3-d of the Regulations of the Secretaries of War and Navy, which was added by the amendment of October 5, 1943, and at page 23 states that the excess-war cost rule was based on this section of the amended Regulation. See also pages 20-25, inclusive, of the same brief which make it clear that the amendment of October 5, 1943, brought about a distinct change in the regulations and the policies applicable to necessity certificates from those which had existed prior to that date.

facility had a greater capacity than was needed for national defense, or where part of it was for defense and part for non-defense purposes. Petitioner's position, as alleged in its proposed amended petition, is that, while the Secretaries of War and Navy had provided for some types of percentage certificates, they had consistently ruled and interpreted their pre-October 5, 1943 regulations as prohibiting the issuance of the particular kind of necessity certificate issued to this petitioner, *i.e.*, one limiting the amortizable cost of a facility necessary in its entirety to national defense to "excess war cost," on the ground that it could be presumed to have post-war utility. That is precisely the reason the Secretaries' regulations were amended with the approval of the President on October 5, 1943 (Section 3-d, War Department Regulations, 8 Fed. Reg. 13824), to authorize them for the first time to consider whether the issuance of a necessity certificate was to the financial advantage of the Government. It is from that amendment that the War Production Board later derived the "excess war cost" rule, and the amendment of October 5, 1943, had no purpose if the Secretaries of War and Navy had not previously been prohibited by their own regulations, rules and policies from issuing certificates containing the "excess war cost" limitation based upon presumed post-war utility. The amendment was expressly made *prospective* only, and the certifying officers were prohibited from applying it to emergency facilities the construction of which had been commenced prior to said date.

The fact that the construction of petitioner's emergency facility had commenced prior to October 5, 1943, and the fact the Secretaries of War and Navy had consistently ruled that their regulations prohibited "excess

war cost" certificates prior to October 5, 1943, as well as the fact that the War Production Board issued to petitioner an "excess war cost" certificate despite Executive Order 9406 directing the use of the pre-October 5, 1943 regulations, are all matters of fact which petitioner seeks to prove in the court below.

Petitioner therefore submits that the Government cannot be heard to say that the alternative issue is disposed of as a matter of law simply by reading Section 5 of the War Department Regulations.

By all the rules of practice laid down by this Court, an issue of *both law and fact* not raised or passed upon below will not be deemed to have been silently disposed of in this Court when the necessary facts were not even in the record reviewed. Where a litigant, in the situation of the present petitioner, has been deprived of his right to seek a new trial by the lower court's error in interpreting what this Court had decided on certiorari, this Court should in the interest of justice and fairness exercise its supervisory power to correct the error.

CONCLUSION

In conclusion the petitioner respectfully requests this Court to grant certiorari, reverse the decision of the Court of Claims of December 4, 1957, and remand the case to the Court of Claims with the advice that this Court did not consider or decide petitioner's alternative issue in reversing the prior decision of the court below, and with instructions to that court to grant further consideration to the petitioner's motion for a new trial and for leave to file an amended petition in the light of such advice.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Claims on Plaintiff's Motion to Vacate Order of July 12, 1957, and for a New Trial and for Leave to File an Amended Petition (Promulgated December 4, 1957)

IN THE UNITED STATES COURT OF CLAIMS

No. 218-54

(Decided December 4, 1957)

THE OHIO POWER COMPANY *v.* THE UNITED STATES

Mr. N. Barr Miller for the plaintiff. *Messrs. J. Marvin Haynes, F. Eberhart Haynes, Oscar L. Tyree,* and *Joseph H. Sheppard* were on the brief.

Mr. Homer R. Mitler, with whom was *Mr. Acting Assistant Attorney General John N. Stull,* for defendant. *Messrs. James P. Garland* and *Robert Livingston* were on the brief.

ON PLAINTIFF'S MOTION TO VACATE ORDER OF JULY 12, 1957, AND FOR A NEW TRIAL AND FOR LEAVE TO FILE AN AMENDED PETITION

MADDEN, *Judge,* delivered the opinion of the court:

This court's original decision of this case appears in 131 C. Cls. 95. We rendered judgment in favor of the plaintiff. The Government filed a petition for *certiorari* to the Supreme Court which the Supreme Court denied. The Government petitioned the Supreme Court for a rehearing, which was denied. After a decision in conflict with ours was rendered by the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.,* 230 F. 2d 161, and after this court had decided the case of *Allen-Bradley Co.* v. *United States,* 134 C. Cls. 800, in accord with its decision in the plaintiff's case, the Government petitioned the Supreme Court for leave to file a second petition for a re-

hearing, and the Court denied that petition. Thereafter the Supreme Court granted *certiorari* in *Allen-Bradley* and *National Lead*, 351 U. S. 981, and on the same date vacated its order denying the Government's petition for a rehearing, and continued that petition. 351 U. S. 980.

The plaintiff then petitioned the Supreme Court to vacate its order continuing the Government's petition for a rehearing. The Court denied the plaintiff's petition. 352 U. S. 905. The Supreme Court reversed our *Allen-Bradley* decision, 352 U. S. 306, and affirmed the *National Lead* decision. 352 U. S. 313. Two months later it granted the Government's petition for rehearing in the plaintiff's case, vacated its order denying *certiorari*, granted *certiorari* and reversed this court's decision on the authority of its *Allen-Bradley* and *National Lead* decisions. 353 U. S. 98. The plaintiff filed a petition for rehearing and reconsideration, which was denied. 353 U. S. 977.

The Supreme Court on April 1, 1957 remanded the case to this court, saying, in part:

> The cause is reversed; and the same is hereby remanded to the United States Court of Claims.

On July 12, 1957 this court entered an order vacating and withdrawing its former judgment and dismissing the plaintiff's petition.

The plaintiff now moves this court to vacate its order of July 12, 1957, which dismissed the plaintiff's petition; to grant the plaintiff a new trial, and leave to file an amended petition.

The plaintiff says, correctly, that this court based its decision in favor of the plaintiff solely upon the ground that the applicable statute did not permit the Government agency to limit the amortizable cost of certified emergency facilities to that percentage of total cost representing excess war cost. It says that, because our earlier decision in *The Wales Corporation* v. *United States*, 123 C. Cls. 741, had been based upon that ground alone, and the Government had not petitioned for *certiorari* in *Wales*, the plaintiff did not consider it necessary to present the alternative

ground for recovery which was present in both the *Wickes* case and the plaintiff's case.

The asserted alternative ground for recovery is that even though the applicable statute did not forbid percentage amortization, the applicable Executive Order and the applicable agency regulation did forbid it, in cases such as the plaintiff's where construction of the emergency facility was begun prior to a specified date. Such an alternative ground was not present in *Allen-Bradley*, *supra*, and *National Lead*, *supra*, the Supreme Court precedents upon which that Court ultimately based its decision against the plaintiff. The plaintiff says that neither this court nor the Supreme Court has considered and adjudicated the merits of its asserted alternative ground for recovery.

So far as this court is concerned, the plaintiff's statement is correct. As to the Supreme Court, the Government says that the alternative ground was presented to that Court. As we have seen, numerous petitions and briefs were filed in the Supreme Court. After that Court had denied the Government's petition for *certiorari* and its petition for a rehearing in the plaintiff's case, and after the Court of Appeals for the Second Circuit had decided *National Lead* and this court had decided *Allen-Bradley*, the Government filed a petition for leave to file, out of time, a second petition for a rehearing in the plaintiff's case, pointing out the conflict between *National Lead* and *Allen-Bradley*, and the fact that petitions for *certiorari* were contemplated in both those cases. The Government was saying, in effect, that the Supreme Court's decisions in those cases, if it granted *certiorari* would decide the question involved in the plaintiff's case, hence the plaintiff's case should be held in abeyance pending those decisions.

The plaintiff filed a brief in opposition to the Government's attempt to keep the plaintiff's case pending to await the possible decisions in *National Lead* and *Allen-Bradley*. In its brief it sought to distinguish *National Lead* on the ground that the contractor there involved, before commencing construction, applied for and received certificates containing percentage limitations on amortizable costs, whereas

the plaintiff had commenced construction before any regulation authorizing such a limitation was in effect. It said, concerning the plaintiff's situation:

> Both at the time of application for the certificate and its issuance, the applicable regulations provided that none of the restrictions on certificates of necessity which had been first announced on October 5, 1943, would apply to construction commenced before that date (8 Fed. Reg. 13824, 10/5/43; Exec. Order 9406, 8 Fed. Reg. 16955, 12/17/43, Footnote 13, supra.)

The Government filed a memorandum in opposition to the plaintiff's brief which we have just discussed. It said that the plaintiff's attempts to distinguish *Allen-Bradley* and *National Lead* were futile, urging that the time of commencement of construction was immaterial, and that neither the Executive Order, nor the Regulations promulgated by the certifying officials, precluded them from making the percentage certifications which, the Supreme Court had held in *Allen-Bradley* and *National Lead*, the statute authorized them to make. The memorandum was of considerable length and was devoted entirely to the plaintiff's attempt to distinguish the two decided cases.

Because of the Government's persistence in its attack upon the plaintiff's judgment, the plaintiff had the opportunity, of which it took advantage, of attempting to distinguish *Allen-Bradley* and *National Lead*, from its own case, after those cases had been decided by the Supreme Court. As the plaintiff's case then stood in the Supreme Court, if the Court had been impressed by the plaintiff's attempted distinction, it could have denied the Government's pending petition for a rehearing, and let its former denial of *certiorari* stand. Or it could have granted *certiorari* and affirmed the judgment with an opinion approving the plaintiff's attempted distinction of its other decisions. In fact it granted *certiorari* and reversed our judgment with an order putting the plaintiff's case on all fours with *Allen-Bradley* and *National Lead*.

The plaintiff, in effect, asks us to conclude that the Supreme Court did not consider and decide the question of

whether the plaintiff's case was distinguishable from *Allen-Bradley* and *National Lead*. The plaintiff's only evidence in support of such a conclusion is that the Supreme Court did not express an opinion upon the question. In court, as elsewhere, silence may be an opinion.

The plaintiff's motions are denied.

It is so ordered.

WASHINGTON, *Circuit Judge*, sitting by designation; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 813

THE OHIO POWER COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION

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Petitioner files this reply to dispose of respondent's erroneous contention that petitioner's alternative issue is based solely on facts which were in the record when this case was here before. At pages 9-10 of its brief in opposition, respondent argues that petitioner's alternative issue is entirely a question of law not dependent upon new facts. That proposition is incorrect.

Respondent now seems to admit that construction of the Tidd plant was commenced in August of 1943, although in the court below the respondent denied that

fact.* The date when construction commenced, however, is only one of the essential facts which petitioner must prove to establish the allegations under the alternative issue.

In its proposed amended petition in the court below, petitioner alleged that the rules, regulations, interpretations, and administrative practices of the Secretaries of War and Navy in effect prior to October 5, 1943, prohibited the issuance of the kind of percentage necessity certificate involved in this case, namely, an "excess war cost" certificate. In order to prove that allegation, petitioner will establish by competent evidence in the court below that the rules and regulations of the Secretaries of War and Navy did not permit the issuance of an "excess war cost" certificate in this case, and that such regulations had been consistently so interpreted and administered not only by the Secretaries of War and Navy but also by the War Production Board with respect to construction commenced prior to October 5, 1943. No such evidence is as yet in the record in this case, and obviously it could not have been considered by this Court when the case was here before. Furthermore, petitioner will prove that the War Production Board's "excess war cost" rule was designed to be applied *prospectively* only, and that the rule was mistakenly applied *retroactively* to petitioner's Tidd plant. Until petitioner is permitted to present all such evidence it will not have had its day in court with respect to the alternative issue raised by the motion below.

In the *Allen-Bradley* and *National Lead* cases, respondent had the benefit of a detailed statement of

* Defendant's Brief in Opposition to Motion for Leave to File Amended Petition and for a New Trial, p. 23

an officer of the War Production Board explaining the interpretations and practices of that Board under its regulations, issued *after* October 5, 1943, to support its "excess war cost" rule. That statement was used by the Government to prove that the War Production Board interpreted the amendment of October 5, 1943, as authorizing for the first time the issuance of "excess war cost" certificates where construction had been commenced *after* that date. Petitioner is likewise entitled to present to the court below that same type of evidence with respect to the interpretation and administration of the regulations in effect *prior to* the amendment of October 5, 1943, and applicable to construction commenced *prior to* such date. Executive Order 9406 (8 Fed. Reg. 16955, 12/17/43) recognizes that the practices and procedures controlling the issuance of necessity certificates under the regulations of the Secretaries of War and Navy were different from those of the War Production Board when it provided that the former should be applied in issuing certificates for facilities commenced before October 5, 1943. Without evidence as to all these facts neither this Court nor the court below can determine the type of certificate legally issuable under the regulations of the Secretaries of War and Navy prior to their amendment. *A fortiori*, this Court could not have passed upon the alternative issue when the case was previously here.

Respondent devotes most of its brief in opposition to the contention that this Court previously considered and rejected *sub silentio* the alternative issue. Petitioner has set forth in its application for certiorari the reasons why this Court could not properly have passed upon the alternative issue and respondent has

failed to offer any authority which would have justified this Court in deciding such issue. The most important of petitioner's reasons is that the facts upon which the alternative issue depends were not in the record and had not been resolved by the trial court. The absence from the record of the facts necessary to decide the alternative issue is, we submit, dispositive of this whole matter.

Certiorari should therefore be granted and the case remanded to the court below with the advice that this Court has not passed upon petitioner's alternative issue. *Cf. Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. , 2 L. ed. 374 (January 27, 1958). Such an order will permit the lower court to exercise its discretion in considering petitioner's motion based on the alterrative issue.

Respectfully submitted,

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No. 913

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE OHIO POWER COMPANY, PETITIONER,

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 813

THE OHIO POWER COMPANY, PETITIONER,

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 1a-5a) is reported at 157 F. Supp. 158.

JURISDICTION

Taxpayer's motion in the court below to vacate its order of July 12, 1957, dismissing the petition pursuant to the mandate of this Court, was denied December 4, 1957. (R. 125.)[1] The petition for writ of certiorari was filed February 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] References to the original record on file in this proceeding are designated as "R. ——." References to the original record filed in this Court in No. 312, October Term, 1955, are designated as "1955 R. ——."

QUESTION PRESENTED

Whether, this Court having earlier reversed the judgment of the court below in this case on the authority of two recent decisions, the court below was required on remand to consider an allegedly new ground which petitioner had unsuccessfully presented to this Court in attempting to distinguish the two cases which this Court found to be controlling.

STATEMENT

On a prior petition for writ of certiorari in this same proceeding, *United States* v. *Ohio Power Co.*, 353 U.S. 98, the judgment of the Court of Claims in favor of taxpayer was reversed on authority of *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313. This Court's decision and mandate read in part as follows:

> On June 11, 1956, we unanimously vacated *sua sponte* our order of December 5, 1955 (350 U.S. 919), denying the timely petition for rehearing in this case (351 U.S. 980), so that this case might be disposed of consistently with the companion cases of *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313, in which we had granted certiorari the same day, *viz.* June 11, 1956. 351 U.S. 981. If there is to be uniformity in the application of the principles announced in those two companion cases, the judgment below in the instant case cannot stand. Accordingly we now grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Claims on the authority of *United States* v. *Allen-Bradley Co.*, *supra*, and *National Lead Co.* v. *Commissioner*, *supra*.

> * * * The cause is reversed; and the same is hereby remanded to the United States Court of Claims. April 1, 1957. * * *

Thereafter the Court of Claims on July 12, 1957, entered an order vacating the earlier judgment in favor of taxpayer and dismissing its petition. (R. 1.)

Taxpayer then filed a motion requesting the Court of Claims to vacate its order of July 12, 1957, to grant taxpayer a new trial, and *leave to file an amended* petition, to raise what it stated to be a new issue. (R. 9-10.) This issue was stated in its motion (R. 13) as follows:

> Could the War Production Board retroactively apply its new excess war cost rule to the certification of plaintiff's "Tidd Project Emergency Facility," the construction of which had commenced prior to October 5, 1943, when the Executive Order from which the Board derived its power and the duly adopted regulation authorizing the excess war cost rule both expressly prohibited their application to construction commenced prior to such date?

The Court of Claims concluded that the issue had been argued by the parties in this Court, and had in effect been resolved by the Court's decision holding the case to be controlled by *Allen-Bradley* and *National Lead*. Accordingly, the court below denied taxpayer's motion. (R. 128.)

ARGUMENT

The Court of Claims properly refused to permit taxpayer to reargue before it a matter previously litigated in, and decided by, this Court.

Taxpayer contends that (Pet. 6) "It is petitioner's position that such alternative ground was not—and could not have been—decided by this Court, and that petitioner has never been heard on this issue." The Court of Claims rejected this contention with the following observation (Pet. 4a):

> Because of the Government's persistence in its attack upon the plaintiff's judgment, the plaintiff had the opportunity, of which it took advantage, of attempting to distinguish *Allen-Bradley* and *National Lead*, from its own case, after those cases had been decided by the Supreme Court. As the plaintiff's case then stood in the Supreme Court, if the Court had been impressed by the plaintiff's attempted distinction, it could have denied the Government's pending petition for a rehearing, and let its former denial of *certiorari* stand. Or it could have granted *certiorari* and affirmed the judgment with an opinion approving the plaintiff's attempted distinction of its other decisions. In fact it granted *certiorari* and reversed our judgment with an order putting the plaintiff's case on all fours with *Allen-Bradley* and *National Lead*.

Another possible alternative, implicitly rejected by this Court, would have been to vacate the judgment of the Court of Claims and to remand for consideration of the taxpayer's argument as to the alleged distinction from *Allen-Bradley* and *National Lead*. The Court, however, reversed on the merits, holding that the latter cases were indistinguishable and controlling. It is this adjudication on the merits by this Court that petitioner

asked the court below to reconsider. The Court of Claims correctly declined to do so.

The extent to which taxpayer was heard in this Court on the issue which it seeks to litigate before the Court of Claims is clearly revealed by the briefs and motions filed by the parties in No. 312, October Term, 1955.

The issue taxpayer would present was first raised by it in its "Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing," filed in response to the Government's motion for leave to file a second petition for rehearing of denial of certiorari, prompted by an asserted fresh conflict caused by the opinion of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161. In its brief (pp. 19-22) taxpayer asserted that the *National Lead* case was distinguishable on the very same grounds it now seeks to urge before the Court of Claims.

On June 11, 1956, this Court vacated its earlier denial of the Government's timely petition for rehearing "so that this case might be disposed of consistently with the companion cases of *United States* v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313, in which we had granted certiorari the same day, *viz.* June 11, 1956." 353 U.S. 98.

Taxpayer then filed an unsuccessful "Motion to Vacate Order of June 11, 1956, and to Dismiss Petition for Rehearing Filed November 10, 1955" (hereinafter called "Motion to Vacate"). In Point II, spanning pages 20 through 44 of its motion, taxpayer asserted that the order of June 11, 1956, should be vacated because, it contended, no decision of this Court in

National Lead or *Allen-Bradley* could adversely affect the decision in its case. The grounds for this allegation were stated to be differences in controlling facts and applicable Regulations (see particularly pp. 21-34)—the same argument now renewed here. In a "Reply Memorandum" taxpayer again (pp. 5-6) asserted this argument.

United States v. *Allen-Bradley Co.*, 352 U.S. 306, and *National Lead Co.* v. *Commissioner*, 352 U.S. 313, were decided on January 22, 1957. Thereafter, on January 28, 1957, this Court entered an order requesting taxpayer to file a response to the Government's petition for rehearing. 352 U.S. 987. In response thereto taxpayer filed with this Court a "Brief of Respondent in Opposition to Petition for Rehearing." In the heading of its brief entitled "Questions Presented," taxpayer acknowledged that the *Allen-Bradley* and *National Lead* decisions had put to rest any issue as to whether the War Production Board had authority under Section 124 of the Internal Revenue Code of 1939 to certify only part of the cost of an emergency facility. The brief continued as follows (pp. 2-3):

> Accepting these decisions with respect to WPB's power to promulgate and apply this regulation, however, the additional and controlling issue presented here is the applicability of the regulation itself. There are also presented wholly unrelated procedural questions involving the timeliness of the Government's petition for a writ of certiorari and the finality of the denial by this Court of the Government's petition for rehearing. The questions now presented here are:

1. Even though WPB had statutory authority to promulgate its excess war cost regulation of October 5, 1943, did it erroneously apply the regulation to Ohio Power's facility, whose construction was commenced about two months prior to the adoption of the regulation, where that regulation and the Executive Order transferring certifying authority to WPB specifically provided that the regulation should not be applied to construction commenced prior to October 5, 1943?

* * * * *

[Questions 2 and 3 raising procedural issues are omitted]

None of these questions was involved in either *Allen-Bradley* or *National Lead.*

Thus, the first question taxpayer posed was whether or not this case was distinguishable from *Allen-Bradley* and *National Lead.* The question was extensively argued on pages 6-15 of their brief.[2] The pertinent portion of

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[2] Argument I of taxpayer's "Brief of Respondent in Opposition to Petition for Rehearing" is entitled:

I. The Amended Regulations of October 5, 1943 did not apply to the Tidd Project because construction thereof had commenced before that date.

A. The Amended Regulation of October 5, 1943 promulgating the Excess-War-Cost Rule was never intended to apply and by specific language in the amended regulation as well as Executive Order 9406 did not apply to construction commenced prior to October 5, 1943.

B. This Court's decisions in *Allen-Bradley* and *National Lead* are inapplicable because the question here is not the statutory authority of the WPB but whether the Board acted here in violation of E.O. 9406 and the Amended Regulation of October 5, 1943.

the answering "Memorandum for the United States in Support of Rehearing" which denied that the cases were distinguishable is set forth as an appendix to this brief, *infra*, pp. 12-15.

It was with this background that on April 1, 1957, certiorari was granted and the case reversed on authority of *Allen-Bradley* and *National Lead*. 353 U.S. 98.

Because this Court in its *per curiam* opinion did not expressly mention the asserted distinction between the cases, taxpayer says it follows that the point was not considered by this Court. It is clear from the record, however, that this Court decided the instant case was indistinguishable from, and controlled by, *Allen-Bradley* and *National Lead* after receiving the parties' briefs on the very point. To conclude the chronological record, it should be noted that on April 25, 1957, taxpayer filed a "Motion for Consideration by the Full Court and Petition for Rehearing." This motion (p. 14) requested reconsideration and alternative relief as follows: (1) Denial of certiorari or (2) a rehearing by the full Court on the effect on *Ohio Power* of the decisions in *Allen-Bradley* and *National Lead*, or (3) amendment of the judgment of April 1, 1957, to provide for remand of the cause to the Court of Claims to consider the claimed distinctions. The discussion of points 2 and 3 cover pages 6-14 of the "Motion for Consideration by the Full Court and Petition for Rehearing." The motion was denied. 353 U.S. 977. Taxpayer's present petition for writ of certiorari amounts to no more than a belated second petition for rehearing and reconsideration as to alternative (3).

Taxpayer seeks to explain away the consequences of its earlier argument of the issue before this Court

by claiming that the prior argument was limited solely to its efforts to oppose certiorari and not to the merits of the cause once certiorari was granted. This is true, taxpayer says, because it made a new argument for the first time in this Court and travelled outside the record to do it. As previously demonstrated, taxpayer's argument was not so narrowly limited. As stated on page 7 of the "Motion for Consideration by the Full Court and Petition for Rehearing":

> Respondent has urged and continues to urge that even though the certifying agency has statutory authority to promulgate its excess war cost regulation of October 5, 1943, as this Court has now held in *Allen-Bradley* and *National Lead*, this regulation was inapplicable to Ohio Power Company's facility.

Moreover, the argument did not require taxpayer to travel outside the record. Taxpayer's argument, that notwithstanding the statute the War Production Board exceeded its authority in limiting the amortization to 35 per cent, requires proof of but two things: (1) The date construction commenced, and (2) the Regulations then applicable. Neither required a new trial to establish.

The date construction commenced is in the record. In its earlier briefs filed in this Court taxpayer consistently gave the date for commencement of construction as August, 1943, citing page 21 of the record. (See "Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing", p. 21; "Motion to Vacate," pp. 22, 23; "Brief of Respondent in Opposition to Petition for Rehearing," pp. 4, 5, 10.) The record reference is to an affidavit of one Howard

G. Dernberger, an assistant treasurer of the taxpayer, filed with the motion for summary judgment which does support the allegation. The Government's counter motion for summary judgment stated it would rely upon the affidavits. (1955 R. 33-34.)

As to proof of the limitation placed on the statutory authority by Regulations, this Court, of course, will take judicial notice of rules and regulations of administrative bodies. *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481; *Tucker* v. *Texas*, 326 U.S. 517.

Along with its "Brief of Respondent in Opposition to Petition for Rehearing", taxpayer filed an appendix of 60 pages setting forth the administrative Regulations relied upon. The Government did not object to the propriety of the argument nor dispute the facts (although it disagreed with the interpretation of them). Indeed, these matters were properly of record aside from the doctrine of judicial notice for they were incorporated expressly or by reference in the affidavit of counsel in support of the Motion for Summary Judgment. (1955 R. 27-31.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1958.

APPENDIX

EXCERPT FROM MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF REHEARING IN THE SUPREME COURT OF THE UNITED STATES (pp. 2-6, No. 312, *United States of America* v. *The Ohio Power Company*, October Term, 1955)

The taxpayer contends, however, that this case is distinguishable from *Allen-Bradley* and *National Lead*; that those decisions are not controlling; and that "the decision below is plainly correct * * * and should not be disturbed."

The Government submits that the taxpayer's attempt to distinguish *Allen-Bradley* and *National Lead* is clearly futile. The asserted distinctions are, on their face, without significance. In essence, taxpayer claims that, because it began the construction of the facilities prior to October 5, 1943, and because paragraph 3(a) of Executive Order 9406, 8 Fed. Reg. 16955, provided that applications with respect to such facilities should be governed by the Regulations of the Secretaries of War and Navy in effect prior to October 5, 1943, this case is essentially different from *Allen-Bradley* and *National Lead*, where the construction began after October 5, 1943. But this factual difference is of no consequence unless the taxpayer is also correct in its basic contention of law that the Board's action in issuing a partial certificate was in violation of the governing Regulations and the Executive Order.

It is now datum, as a result of the Court's decisions in *Allen-Bradley* and *National Lead*, that the statute granted authority to issue partial certificates. Taxpayer must therefore attempt to sustain the burden that, though authorized by statute, the certifying officials had, by Regulations, precluded themselves from exercising this authority prior to the promulgation of

Executive Order 9406 and, if they had not, that the Executive Order prohibited them from exercising their statutory authority in situations where construction had begun prior to October 5, 1943, and where, as here, the application for a certificate was not filed until later (November 16, 1943). For the reasons briefly summarized below, we think it abundantly clear that this burden has not been, and cannot be, met.

(a) From the very beginning, those charged with responsibility recognized their statutory authority to issue partial certificates in appropriate circumstances where they concluded that only part of the cost of a particular facility was necessary in the national defense. Thus, Section 5(a), War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Reg. 4233 (1942) stated that necessity certificates were conclusive evidence that the facilities were necessary in the interest of the national defense "up to the percentage therein designated * * *." And, except for the inclusion of the specific percentage, the certificate in this case, as in *Allen-Bradley* and *National Lead*, follows the identical language of Section 5(a) of these Regulations, which were cited by this Court as showing that the administrative officials had consistently interpreted the statute as authorizing such partial certificates. (*Allen-Bradley*, slip opinion, p. 4, footnote 2.) And the Treasury Regulations, issued soon after the enactment of the Second Revenue Act of 1940, made it crystal clear that the administrators assumed that they possessed and would exercise the authority to issue partial certificates. Section 19.124.6, as added by T. D. 5016, 1940-2 Cum. Bull. 119. These Regulations, too, were cited for the same proposition in the *Allen-Bradley* opinion (*ibid.*).

The taxpayer does not point to a single provision of the War and Navy Department Regulations, which

govern this case, to document its assertion that the partial certification here was "in the teeth" of these Regulations. The provisions relied on by this Court conclusively show the contrary, namely, that the administrators did not voluntarily restrict themselves from exercising the full measure of authority granted by Section 124(f). Whether that authority had or had not been exercised prior to October 5, 1943, in situations where post-war utility appeared probable is not important here, since it depended on the factual circumstances then existing; the only question is whether the legal authority to do so existed. It would be extraordinary to find evidence that such authority, vested by statute, had been voluntarily relinquished or waived by the responsible administrators; and such evidence would doubtless have to be clear and specific to warrant so exceptional a conclusion. But taxpayer can find none.

(b) There is similarly no basis for the taxpayer's assumption that Executive Order 9406 was intended to preclude the certifying officials, in passing on future applications filed with respect to facilities which were then under construction, from issuing partial certificates when they deemed that the circumstances, including the probability of post-war utility to the taxpayer, warranted such action. The Executive Order contains no prohibition, explicit or implied, to that effect; and here too it may reasonably be presumed that if there had been an intent to curtail existing authority, it would have been clearly stated. The fact that subparagraph (a) and (b) of paragraph 3 of the Executive Order drew a distinction between facilities whose construction was begun before October 5, 1943 and facilities constructed after that date, does not warrant the taxpayer's assumption that the certifying officials would thereafter be precluded from issuing partial certificates in the former situation and would only be per-

mitted to do so in the latter. Obviously, the distinction was drawn in the Order because thereafter no certificates would be issued for proposed facilities except *in advance* of construction, a requirement which, out of fairness, was not to be imposed where, in reliance on prior regulations, construction had been begun prior to application for a certificate.

The only assurance which the Executive Order gave to the taxpayer was that, since it commenced construction of the project prior to October 5, 1943, a timely, subsequent application would be considered on its merits. Neither before nor after the Executive Order did the taxpayer have any assurance that the project already under construction would qualify for certification or that its full cost would be certified as necessary in the interest of national defense. The Order left the administrators wholly free to make such determination as the particular circumstances required: they could issue a certificate for the full cost, or none at all, or, as in this case, for only that part of the cost which they deemed necessary in the interest of the national defense.[1]

In sum, the present case is indistinguishable in its pertinent facts from *Allen-Bradley* and *National Lead*.[2]

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[1] Although the parties made no point of this, it should be noted that in *Allen-Bradley* one of the "partial" certificates was subject to the same paragraph of Executive Order 9406 which governs this case. (See R. 5-6 in No. 78, this Term.)

[2] Even if the distinctions asserted by the taxpayer are germane, it would not follow, as the taxpayer tacitly assumes, that it would be entitled to amortize the full cost of the property, in view of the fact that there never was an administrative determination that the full costs were necessary in the interest of the national defense. The Government's argument in this respect was sustained by the Second Circuit in the *National Lead* case, but in view of the disposition of the cases made by this Court was not reached on review here.

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